UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

In re EXPRESS SCRIPTS, INC., PBM LITIGATION	Master Case No. 4:05-md-1672-HEA
This Document Relates to: Patrick J. Lynch v. NPA, Inc., et al No. 4:05-cv-00828-HEA	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUGGESTION FOR REMAND

Plaintiff Patrick J. Lynch ("Lynch"),[1] respectfully requests that the Court suggest to the MDL Panel that it remand this case to the Southern District of New York. As shown below, this is the only case remaining in the Express Scripts MDL, and the chief purposes of the original transfer—"eliminat[ion of] duplicative discovery, prevent[ion of] inconsistent pretrial rulings…and conserv[ation of] the resources of the parties, their counsel and the judiciary"—are no longer being served by maintenance of the MDL proceedings in this District. *See* Transfer Order, No. 4:05-md-01672, doc. #1 (Apr. 29, 2005).

Background

The PBA Funds originally filed this action on February 26, 2003 in the Southern District of New York. Defendants moved to transfer the case on May 9, 2003 (No. 4:05-md-01672, doc. #s 5-6), and the New York court denied that motion by Order dated March 1, 2004.

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1 Plaintiff Patrick Lynch is the President of the Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA"), a labor union that serves as the exclusive collective bargaining representative for active and retired police officers of the City of New York.

A year later, after multiple cases were filed against ESI and National Prescription Administrators ("NPA"), the Judicial Panel on Multidistrict Litigation ordered this case and seven others transferred to the Honorable Stephen N. Limbaugh in the Eastern District of Missouri for coordinated or consolidated pretrial proceedings. See MDL Transfer Order dated April 29, 2005. After transfer, the parties, with the Judge Limbaugh's approval, eventually structured the MDL into five separate tracks: (1) *Fidelity* Track; (2) the ESI ERISA Track; (3) the ESI Non-ERISA Track; (4) the NPA ERISA Track; and (5) the NPA Non-ERISA Track. *Lynch* was assigned to the NPA Non-ERISA Track, along with one other case—*The Correctional Officers' Benevolent Ass'n of the City of New York, Inc. ("COBA") v. ESI, et al.*, 4:05-cv-00182-HEA.

At present, *Lynch* is the only case remaining in the MDL. Specifically, all other cases pending in the five tracks have been dismissed, as follows:

1. Fidelity Track: Case settled and voluntarily dismissed on the eve of trial on August 9, 2011 (No. 4:03-cv-1521, doc. # 487);
2. ESI ERISA Track: All cases were voluntarily dismissed in 2011 (No. 4:05-md-1672, doc. #s 555, 556, 557, 566, 567, 568, 569, 570, 571, 574).
3. ESI Non-ERISA Track: All three cases were dismissed by this Court's order entered April 9, 2014 and all plaintiffs chose not to appeal that Order (No. 4:05-cv-1081, doc. # 19);
4. NPA ERISA Track: All cases, except one, were voluntarily dismissed in 2011 and 2013 (No. 4:05-md-1672, doc. #s 478, 504, 580, 581, 582). The one remaining case, *Local 153 v. ESI*, was voluntarily dismissed earlier this year. (No. 4:05-md-1672, doc. # 597).

5. NPA Non-ERISA Track: The only two cases in this Track, *Lynch* and *COBA,* were dismissed by this Court's Order dated April 9, 2014 (No. 4:05-cv-00828, doc. #21), and COBA chose not to appeal the dismissal of its case.

As noted above, this Court dismissed *Lynch* on April 9, 2014, holding that a settlement between the New York Attorney General and ESI barred the PBA Funds' action on the basis of res judicata. No. 4:05-cv-00828, doc. #21. On May 27, 2015, the Eighth Circuit reversed and remanded for further proceedings. No. 4:05-cv-00828, doc. #s 28, 29. On June 25, 2015, Defendants filed a Renewed Motion for Summary Judgment. Plaintiff opposed that motion on July 16, 2015.

At the time of the dismissal of *Lynch* in April 2014, the following motions were pending in the NPA Non-ERISA Track: (1) COBA and Lynch's motion for class certification (4:05-md-01672, doc. #395, fully-briefed as of 2/16/2010); (2) cross-motion for summary judgment on the question of whether NPA was a fiduciary under New York law (4:05-cv-00828, doc. #16, fully-briefed as of February 16, 2010); and (3), and Lynch's motion for leave to amend to, *inter alia*, add a breach of contract claim (No. 4:05-md-1672, doc. # 467, fully-briefed as of 12/14/2010).

With respect to Lynch's claims against NPA, substantial discovery had been completed in advance of the cross-motions for summary judgment. Given the departure of COBA (and all other plaintiffs in this MDL), the discovery that remains is specific to the Funds at issue in *Lynch*, i.e., the Health & Welfare Fund of the Patrolmen's Benevolent Association of the City of New York and the Retiree Health & Welfare Fund of the Patrolmen's Benevolent Association of the City of New York (the "PBA Funds").

Argument

Pursuant to the Multidistrict Litigation Governing Statute, 28 U.S.C. § 1407, civil actions that involve one or more common questions of fact can be transferred to a single district for coordinated or consolidated pretrial proceedings. "A MDL seeks to promote judicial economy and litigant efficiency by allowing the transferee court to preside over matters common among all cases . . . The MDL procedure is . . . designed to maximize efficiency and fairness by minimizing both the sheer number of rulings required, and any discrepancies between and among them." *In re Phenylpropanolamine Prods. Liability Litig.*, No. MDL 1407, 2004 WL 2034587, at * 2 (W.D. Wash. Sept. 3, 2004) (internal citations omitted).

The power to remand a case to the transferor court lies solely with the Judicial Panel on Multidistrict Litigation (the "Panel"), 28 U.S.C. § 1407(a), but the transferee judge may recommend remand of an action to the transferor court by filing a suggestion of remand with the Panel, JPML Rule 10.1(b). A transferee court should suggest remand when there is "good cause." *In re Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig.*, No. 2:03-MC-1565, 2004 WL 882456, at *2 (S.D. Ohio Mar. 25, 2004). Good cause for remand "generally turns on the question of whether the case will benefit from further coordinated proceedings as part of the MDL," including whether continued consolidation "will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." *In re Aetna UCR Litig.*, MDL No. 2020, 2010 WL 3762281, at *1 (D.N.J. Sept. 10, 2010) (internal quotations omitted).

Here, a suggestion of remand is appropriate because: (1) all remaining discovery is case-specific to *Lynch* and unrelated to prior discovery in the consolidated actions; (2) the pending motions depend on issues of law that can be as easily or more easily decided by the transferor court; and (3) *Lynch* is the only action remaining in the MDL.

The Remaining Discovery Is Case-Specific

The gravamen of Lynch's complaint (current and proposed amended) is that NPA overcharged the PBA Funds for prescriptions that were dispensed to PBA plan members and paid for by the Funds. To prove such claims, Lynch intends to audit NPA's performance under the specific terms of the contracts between the PBA Funds and the NPA. While those contracts have been produced by the parties, the remaining discovery will cover the production of claims data, plan design documents and related email and paper-based communications. Such discovery will be specific to the relationship between the PBA Funds and NPA, and none of the remaining discovery includes topics or specific documents that have been disputed in the past and resolved by earlier rulings by this Court.

Indeed, at no point in the prior proceedings has this Court been called upon to supervise or otherwise develop expertise in matters relating to NPA's practices under its contracts with the PBA Funds, or any other funds that had contracted with NPA. While Judge Limbaugh issued multiple rulings in other MDL Tracks on certain discovery matters and the merits, his rulings were specific to ESI's practices under its contracts with its clients.

Simply stated, the remaining discovery in *Lynch* is entirely case specific and will not delve into matters that require any expertise that this Court has gained in supervising the NPA Tracks. Accordingly, remand is appropriate. *See In re Multidistrict Civil Actions Involving Air Crash Disaster Near Dayton, Ohio, on March 9, 1967*, 386 F. Supp. 908, 909 (J.P.M.L. 1975) (resolution of pending motions unique to action at issue "does not require any particular expertise that the transferee judge might have gained from supervising this litigation."); *In re Bridgestone/Firestone*, 128 F. Supp. 2d at 1198 (discussing that remand may be appropriate when "the remaining discovery is entirely case-specific").

The Pending Motions Present Issues of State Law and Case-Specific Facts That Would Be Appropriately Decided by the Transferor Court

The PBA Funds have filed a motion to amend to add a breach of contract claim that is currently pending in front of this Court. The issues presented by this motion are also entirely case-specific, and could be appropriately decided by the transferor court. *Cf. In re Nuvaring Prods. Liab. Litig.*, No. 4:08MD1964, 2009 WL 4825170, at *2 (E.D. Mo. 2009) (denying motions to dismiss and explaining that deciding motions to dismiss claims brought under various states' laws is "neither the purpose, nor the forte, of a court presiding over a multi-district litigation" (internal citation omitted)).

There are also cross-motions for summary judgment currently pending in front of the Court to determine whether NPA was a fiduciary under New York state law. Because that issue depends on the interpretation of New York law, it too would be appropriately decided by the transferor court. The transferor court, the Southern District of New York, is best situated to decide the issues of state law presented by such a motion. *In re Orthopedic Bone Screw Prods. Liability Litig.*, MDL No. 1014, 1997 WL 109595, at *2 (E.D. Pa. Mar. 7, 1997) ("[T]he transferor court would be better equipped to render a decision in accordance with . . . its forum state's substantive law."); *In re Zyprexa Prods. Liability Litig.*, No. MDL 1596, 2004 WL 2812095, at *5 (E.D.N.Y. Dec. 3, 2004) (suggesting remand of certain claims to Eastern District of Tennessee, which would be "undoubtedly familiar with special state law and jail practices" in Tennessee).[2]

The pending motion for class certification depends on an analysis of case-specific facts that would be appropriately decided by the transferor court. *See In re Multidistrict Civil Actions*

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[2] Although Judge Limbaugh issued orders interpreting New York law in denying ESI's motion to dismiss (which was originally filed in the Southern District of New York), the fact remains that the transferor court, sitting in New York, will have more experience with and greater familiarity with New York law than this Court.

Involving Air Crash Disaster Near Dayton, Ohio, on March 9, 1967, 386 F. Supp. 908, 909 (J.P.M.L. 1975) (resolution of pending motions unique to action at issue "does not require any particular expertise that the transferee judge might have gained from supervising this litigation."); *cf. In re Bridgestone/Firestone*, 128 F. Supp. 2d at 1198 (discussing that remand may be appropriate when "the remaining discovery is entirely case-specific"). Indeed, with the Court's approval, Plaintiff Lynch agrees to withdraw the pending class certification motion, thereby mooting any grounds for retaining jurisdiction to rule on that long-pending motion.

Finally, the pending Renewed Motion for Summary Judgment depends solely on the interpretation of the language of the Consent Judgment entered by the New York Attorney General and ESI in settlement of litigation brought on behalf of New York State and "other New York government plans," not including the Funds. To the extent the decision requires any fact-finding, the record is extremely limited. The Southern District of New York can decide this motion—presenting essentially a question of contract interpretation—as easily as this Court.

Lynch *Is the Only Case Remaining in the MDL*

Finally, this case is the only case remaining in the MDL. While such a posture is not dispositive, it does weigh in favor of remand to the transferor court, especially when considered in conjunction with the factors already discussed. *See In re Air Crash Disaster*, 386 F. Supp. at 909 ("Since the Humphreys action is the only action remaining in this litigation, we find that no purpose would be served by delaying remand of this action to the Eastern District of Michigan."); *In re Baseball Bat Antitrust Litig.*, 112 F. Supp. 2d at 1177 (transferee judge suggesting remand because, among other things, "all actions save *Baum* have been terminated in the transferee district"). The lack of other cases means that the primary goals of consolidation—elimination of duplicative discovery, prevention of inconsistent pretrial rulings…and conservation of the resources of the parties, their counsel and the judiciary—are no longer being served by maintenance of the MDL proceedings in this District. This factor also weighs in favor of remand to the transferor court.

Conclusion

This action should be remanded to the transferor court because (1) all remaining discovery is case-specific and will not cover topics or matters that will require any expertise that this Court has developed in presiding over the NPA Tracks since 2008; (2) the pending motions depend on issues of law that can be as easily or more easily decided by the transferor court; and (3) *Lynch* is the only action remaining in the MDL. For these reasons, Plaintiff respectfully requests that the Court suggest to the Panel a remand to the transferor court.

Dated: July 20, 2015

Respectfully submitted,

/s/ William H. Narwold
William H. Narwold
bnarwold@motleyrice.com
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
Phone: 860-882-1681
Fax: 860-882-1682

David A. McKay
david@damckaylaw.com
LAW OFFICES OF DAVID A. McKAY LLC
555 North Point Center East, Suite 400
Alpharetta, GA 30022
Phone: 678-366-5180
Fax: 678-366-5001